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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SILJAN, INC., et al.,

Plaintiffs and Appellants,

v.

FILET MENU, INC.,

Defendant and Respondent.

B207383

(Los Angeles County
Super. Ct. No. BS102627)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed.

Leonard, Dicker & Schreiber and Kevin S. Dicker for Plaintiffs and Appellants.

Steven B. Stevens for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs, Siljan, Inc., Sylvia Martinez, and Gloria's Pupuseria, appeal from a March 28, 2008 order denying their motion for attorney fees on appeal. We reverse the order denying plaintiffs' attorney fees motion. Upon remittitur issuance, the trial court is to determine the amount of fees payable to plaintiffs.

II. BACKGROUND

Plaintiffs and defendant, Filet Menu, Inc., entered into a May 17, 1994 "credit application and agreement" which provided in part, "In any dispute between the parties [plaintiffs] agree to pay any attorney and collection expenses whether the matter proceeds to court (or arbitration at [defendant's] discretion according to the rules of the American Arbitration Association) or not." Defendant instituted arbitration of a dispute arising out of the credit agreement. Plaintiffs did not participate in the arbitration. On December 28, 2005, an arbitrator with the American Arbitration Association's Commercial Arbitration Tribunal issued an award in defendant's favor. On April 10, 2006, plaintiffs filed in the trial court a petition to vacate the arbitration award. This was the first pleading filed in a court in relation to the credit agreement dispute. The trial court denied the petition to vacate the arbitration award. The trial court entered a June 19, 2006 judgment confirming the award in defendant's favor.

Plaintiffs appealed from the judgment confirming the arbitration award. On August 29, 2007, we reversed the judgment confirming the arbitration award. (*Siljan, Inc. v. Filet Menu, Inc.* (Aug. 29, 2007, B193346) [nonpub. opn.].) We found there was no enforceable arbitration agreement. We directed: "The judgment is reversed. Plaintiffs, Siljan[,] Inc., Gloria's Pupuseria, and Sylvia Martinez, are awarded their costs on appeal from defendant, Filet Menu, Inc." (*Id.*, typed opn. at p. 13.) The remittitur issued on October 30, 2007. Consistent with our opinion, the remittitur stated,

“Plaintiffs, Siljan[,] Inc., Gloria’s Pupuseria, and Sylvia Martinez, are awarded their costs on appeal from defendant, Filet Menu, Inc.”

After our opinion was filed, but before the remittitur issued, plaintiffs filed two civil complaints in the trial court arising out of the credit agreement dispute. The first complaint was for breach of a settlement agreement. The second complaint was for breach of the credit agreement and for fraud. Those two civil actions are pending in the trial court.

Following remittitur issuance, plaintiffs filed a motion to recover their attorney fees incurred on successful appeal from the judgment confirming the arbitration award. Plaintiffs based their attorney fees motion on our unpublished opinion, Code of Civil Procedure section 1033.5, subdivision (c), and Civil Code section 1717. The trial court denied the attorney fees motion. The trial court ruled, “While Siljan did obtain a reversal of the award of the arbitrator, that quite clearly did not end the dispute between these parties.” Hence, the trial court found the attorney fees motion was premature.

III. DISCUSSION

A. Our Cost Award In The Prior Appeal Does Not Govern Entitlement To Attorney Fees

As noted above, in the prior appeal, we awarded plaintiffs their costs on appeal. Plaintiffs contend our judgment required that the trial court award attorney fees incurred on appeal. Plaintiffs assert: “Here, the primary question is whether the trial court had the right to revisit the award of costs in the first place. The secondary issue is whether the [Court of Appeal] Opinion was correct in determining that the criteria for costs had been met.” Plaintiffs’ position—which fails to distinguish between costs and attorney fees—is without merit.

Our judgment in *Siljan, Inc. v. Filet Menu, Inc.*, *supra*, awarded costs on appeal, not attorney fees on appeal. (Cal. Rules of Court, rule 8.278(d)(2); *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 925-928; *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1149-1150; *M.C. & D. Capital Corp. v. Gilmaker* (1988) 204 Cal.App.3d 671, 677.) Our judgment had no bearing on recovering attorney fees on appeal. (Cal. Rules of Court, rule 8.278(d)(2); *Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at pp. 925-928.) As the Court of Appeal has held, “[A] decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney fees on appeal. [Citations.]” (*Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at p. 927.) Moreover, California Rules of Court rule 8.278(d)(2) states, “Unless the [Court of Appeal] orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” In order to recover their attorney fees on appeal, plaintiffs had to request them in the appellate or trial court and show their right to such fees under either a statute or a contract. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at p. 927.) The trial court’s order denying attorney fees is not reversible on grounds it improperly refused to comply with our judgment.

B. Plaintiffs Prevailed In The Post-Arbitration Judicial Proceedings And Are Entitled To Contractual Attorney Fees

Plaintiffs argue they are entitled to attorney fees incurred on appeal from the judgment confirming the arbitration award. We independently review the legal basis for an attorney fees award as a question of law. (*Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at p. 923; *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 340; *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 604; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84

Cal.App.4th 671, 677.) We conclude plaintiffs are entitled to their attorney fees. Accordingly, we reverse the order denying plaintiffs their fees.

Code of Civil Procedure¹ section 1293.2 states, “The court shall award costs upon any judicial proceeding under this [arbitration] title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.” A petition to vacate an arbitration award is a proceeding covered by section 1293.2. (§ 1285; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260.) An award of costs under section 1293.2 is mandatory. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, 513; *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 707; *Carole Ring & Associates v. Nicastro, supra*, 87 Cal.App.4th at p. 260.) Chapter 6 of title 14 of part 2 of the Code of Civil Procedure, sections 1021 through 1038, defines costs within the meaning of section 1293.2. Pursuant to section 1033.5, subdivision (a)(10), attorney fees are allowable as costs when authorized by statute or contract. And a statutory or contractual right to attorney fees extends to fees incurred on appeal. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637; *Wilson v. Wilson* (1960) 54 Cal.2d 264, 272; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1610; *Villinger/Nicholls Development Co. v. Meleyco* (1995) 31 Cal.App.4th 321, 329.) As the Court of Appeal explained in *Villinger/Nicholls Development Co. v. Meleyco, supra*, 31 Cal.App.4th at page 329, “Where a contract or a statute creates a right for the prevailing party to recover attorney fees, the prevailing party is also entitled to attorney fees on appeal.” Hence, plaintiffs were entitled to recover their attorney fees as costs under section 1293.2 if they had a contractual right to such fees. The credit agreement provides: ““In any dispute between the parties [plaintiffs] agree to pay any attorney and collection expenses whether the matter proceeds to court (or arbitration at [defendant’s] discretion according to the rules of the American Arbitration Association) or not.” ~(AA tab1, p. 1)~ Under Civil Code section 1717, subdivision (a),

the attorney fees clause is deemed to be reciprocal, and to allow the prevailing party to recover its attorney fees. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1090-1091; *Hsu v. Abbata* (1995) 9 Cal.4th 863, 870.) The question before us is whether the post-arbitration judicial proceedings constituted “any dispute between the parties” within the meaning of the credit agreement’s attorney fees provision. (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742-743; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 334-335.) In resolving that question, we apply the ordinary rules of contract interpretation. (*Gil v. Mansano, supra*, 121 Cal.App.4th at p. 743; *Thompson v. Miller, supra*, 112 Cal.App.4th at p. 335.) This court has held: “‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. . . . Such intent is to be inferred, if possible, solely from the written provisions of the contract. . . . The “clear and explicit” meaning of these provisions, interpreted in their “ordinary and popular sense,” unless “used by the parties in a technical sense or a special meaning is given to them by usage” . . . , controls judicial interpretation. . . . Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning’” [Citation.]’ (*Excess Electronix v. Heger Realty Corp., supra*, 64 Cal.App.4th at p. 709.) If the parties do not present extrinsic evidence to interpret the attorney fee provision of a contract, the appellate court determines de novo whether the contractual attorney fee provision entitles the prevailing party to attorney fees. (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 880; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 334-335.)” (*Gil v. Mansano, supra*, 121 Cal.App.4th at p. 743; accord, *E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470; *Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1069.)

In its ordinary and popular sense, “dispute” means: “a debate, controversy, or difference of opinion,” “a wrangling argument; quarrel” (*Dictionary.com Unabridged* (v

¹ All further statutory references are to the Code of Civil Procedure except where otherwise noted.

1.1). Random House, Inc.); “[a] verbal controversy; a debate” (*The American Heritage Dictionary of the English Language, Fourth Edition*, Houghton Mifflin Company, 2004); or “a disagreement or argument about something important” (*WordNet 3.0*. Source location: Princeton University). (<<http://dictionary.reference.com/browse/dispute>> [as of Feb. 10, 2009]). As the Court of Appeal explained in *Thompson v. Miller, supra*, 112 Cal.App.4th at page 337, “While ‘dispute’ includes a conflict giving rise to [a lawsuit brought in court], it is not necessarily limited to such a conflict.”

We conclude the language of the attorney fees provision is sufficiently broad to extend to the post-arbitration judicial proceedings. The attorney fees clause broadly applies to “any dispute between the parties” in a court action or arbitration proceeding. (See *Thompson v. Miller, supra*, 112 Cal.App.4th at p. 336.) The present proceedings concerned a “dispute between the parties.” The parties had a difference of opinion as to whether the arbitration award should be confirmed or whether it should be vacated. They disagreed whether there was an enforceable agreement to arbitrate. Therefore, plaintiffs had a statutory (§ 1293.2) and contractual right to recover their attorney fees. (See *Gil v. Mansano, supra*, 121 Cal.App.4th at p. 744; *Thompson v. Miller, supra*, 112 Cal.App.4th at p. 337.)

Further, the post-arbitration judicial proceedings were a distinct legal proceeding for purposes of determining entitlement to attorney fees. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 799, 805-808; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, supra*, 129 Cal.App.4th at pp. 513-516; compare *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 76-77; *Lachkar v. Lachkar* (1986) 182 Cal.App.3d 631, 648-649.) The post-arbitration judicial proceedings commenced with plaintiffs’ petition to vacate the arbitration award—the first pleading filed in the superior court arising out of this dispute—and ended with a finding on appeal that there never was an enforceable arbitration agreement. Once, as here, there is a final resolution of the arbitration question—a final determination there is no right to arbitrate—then the prevailing party may recover contractual attorney

fees. (*Otay River Constructors v. San Diego Expressway*, *supra*, 158 Cal.App.4th at pp. 799, 805-808; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group*, *supra*, 129 Cal.App.4th at pp. 513-516.) The post-arbitration judicial proceedings are final. Plaintiffs prevailed. They are entitled to recover their attorney fees.

C. Plaintiffs' Request For Attorney Fees On Appeal Should Be Resolved In The Trial Court

We decline to consider plaintiffs' request for attorney fees incurred in this appeal. We leave that issue in the good hands of the trial court. (*Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at p. 930; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 14.112, pp. 14-23 to 14-24 (rev. #1, 2007.)) Plaintiffs may pursue their attorney fees incurred in this appeal pursuant to rule 3.1702(c) of the California Rules of Court. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 14.122 et seq., pp. 14-30 to 14-34 (rev. #1, 2007.))

IV. DISPOSITION

The March 28, 2008 order denying plaintiffs' motion for attorney fees on appeal is reversed. The matter is remanded for a determination of plaintiffs' attorney fees.

Plaintiffs, Siljan, Inc., Sylvia Martinez, and Gloria's Pupuseria, are to recover their costs on appeal from defendant, Filet Menu, Inc.

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TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Dissenting

I respectfully dissent.

There is no disagreement that a party is entitled to attorney fees if it is the prevailing party under the contract containing the attorney fees clause. Whether a party is entitled to an award of attorney fees under the attorney fees clause normally depends on the wording of that clause.

The attorney fee clause in question here refers to “any dispute between the parties.” The word “dispute” must refer to a dispute concerning the effect, validity, performance, or breach of the contract and not to every procedural dispute that might arise during the dispute resolution process. Otherwise, attorney fees would be awardable in connection with such issues as discovery and pleadings. Interim victories, including appellate victories, do not result in an entitlement to attorney fees, unless the contractual attorney fees provision specifically says so. (See *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 928; *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 76-77.)

In this case, I consider the arbitration steps to be procedural aspects of the overall resolution of the breach of contract dispute. The dispute has not been resolved, and therefore, as the trial court determined, there is no prevailing party entitled to attorney fees. Had the attorney fees clause referred to a “proceeding,” instead of a “dispute,” then perhaps there was a prevailing party in a proceeding for purposes of attorney fees. But the clause here refers to a dispute.

In *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, 516 (*Marcus & Millichap*), the court stated, “[f]inally, although not raised in its briefs on appeal, Marcus & Millichap suggested at oral argument that, even if Woodman and Sasson are prevailing parties and

entitled to an award of costs under section 1293.2, they are not entitled to attorney fees under the parties' contract until they prevail on the underlying contract claim. The listing agreement, however, authorizes the award of attorney fees '[i]n any litigation or other legal proceeding which may arise between any of the parties hereto.' This contractual language like section 1293.2 itself, requires postarbitration judicial proceedings to be considered a discrete 'legal proceeding' for purposes of determining a party's right to an award of attorney fees." The court relied on the contractual language authorizing an award of attorney fees to the prevailing party in "any . . . arbitration or other legal proceeding." Here, the contractual language concerning attorney fees for the prevailing party "[i]n any dispute between the parties" dictates a result different than that in the *Marcus & Millichap* case.

In *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 806 (*Otay*), the attorney fees provision in the contract allowed "'the prevailing party *in any proceeding* (including appeals)'" (italics added) to recover attorney fees. The court held that in defeating a petition to compel arbitration, a party was the prevailing party "in this discrete legal proceeding" for purposes of attorney fees. (*Id.* at p. 808.) Admittedly, some of the language in the opinion in *Otay* is not as clear as in *Marcus & Millichap*, *supra*, 129 Cal.App.4th 508, as to the significance of the wording of the attorney fees clause. But the result in *Otay* can be attributed to the same principle.

That the dispute in this case will be resolved in a separate action is of no consequence. The point is that the contractual dispute was not resolved in this action, and therefore there is not yet any prevailing party for purposes of attorney fees. I believe that generally what the parties agree to in their contract should govern their rights and obligations—party autonomy. That is the essence of our law that the American rule governing attorney fees is not applicable when the parties have contracted as to attorney fee awards. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 279.)

Accordingly, I would affirm the trial court's order.

MOSK, J.